Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000173-001 DT 11/04/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

KARI DANIELLE FORSBERG (001)

STEPHEN DOMINIC BENEDETTO

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

HIGHER COURT RULING / REMAND

Lower Court Case Number M–0751–TR–2012–019858.

Defendant-Appellee Kari Danielle Forsberg (Defendant) was convicted in Scottsdale Municipal Court of driving under the extreme influence. Plaintiff-Appellant the State contends the trial court erred in imposing an illegal sentence. For the following reasons, this Court vacates the sentence imposed and remands for resentencing.

I. FACTUAL BACKGROUND.

On August 24, 2012, Defendant was charged with driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28–1382(A)(1) (0.15 or more); driving under the extreme influence, A.R.S. § 28–1382(A)(2) (0.20 or more); and driving in a bicycle path, A.R.S. § 28–815(D). On January 25, 2013, Defendant pled guilty to all charges. For the 1382(A)(2) charge, the trial court imposed sentence as follows:

> 45-day jail term of the initial—as the State would indicate, initial sentence, but it's 45 days in terms of the requirement under the statute. Now, the statute under sub (I) allows the Court to suspend 31 of those days, leaving 14 days. Of the 14 days, 3 are served in custody and 11 are served in home detention.

(R.T. of Feb. 8, 2013, at 6.)

On February 15, 2013, the State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: WHAT IS MEANT BY "THE INITIAL TERM OF INCARCERATION IN JAIL" IN A.R.S. § 9–499.07(N)(3).

Resolution of this issue involves the interpretation of the following statutes:

> A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this state if the person has an alcohol concentration as follows within 2 hours of driving or being in actual physical control of the vehicle and the alcohol concentration results from alcohol consumed either before or while driving or being in actual physiccal control of the vehicle:
>
> 1. 0.15 or more but less than 0.20.
>
> 2. 0.20 or more.
>
> . . . .
>
> D. A person who is convicted of a violation of this section:
>
> 1. Shall be sentenced to serve not less than 30 consecutive days in jail and is not eligible for probation or suspension of execution of sentence unless the entire sentence is served if the person is convicted of a violation of subsection A, paragraph 1 of this section. A person who is convicted of a violation of subsection A, paragraph 2 of this section shall be sentenced to serve not less than 45 consecutive days in jail and is not eligible for probation or suspension of execution of sentence unless the entire sentence is served.
>
> . . . .
>
> I. Notwithstanding subsection D, paragraph 1 of this section, at the time of sentencing if the person is convicted of a violation of subsection A, paragraph 1 of this section, the judge may suspend all but 9 days of the sentence if the person equips any motor vehicle the person operates with a certified ignition interlock device for a period of 12 months. If the person is convicted of a violation of subsection A, paragraph 2 of this section, the judge may suspend all but 14 days of the sentence if the person equips any motor vehicle the person operates with a certified ignition interlock device for a period of 12 months. If the person fails to comply with article 5 of this chapter and has not been placed on probation, the court shall issue an order to show cause why the remaining jail sentence should not be served.

A.R.S. § 28–1382(A)(1)(2), (D)(1), (I).

> N. If the city or town establishes a home detention or continuous alcohol monitoring program under subsection L or M of this section, a prisoner must meet the following eligibility requirements for the program:
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> . . . .
>
> 3. [I]f the prisoner is sentenced under § 28–1381, subsection K or 28–1382, subsection D or E, the prisoner first serves a minimum of 20 per cent of ***the initial term of incarceration in jail*** before being placed under home detention or continuous alcohol monitoring.

A.R.S. § 9–499.07(N)(3) (emphasis added).

In the present case, for the 1382(A)(2) charge, the trial court imposed "45 consecutive days in jail" under A.R.S. § 28–1382(D)(1) and then suspended "all but 14 days of the sentence" under A.R.S. § 28–1382(I). It then considered the 14 days as "the initial term of incarceration in jail" under A.R.S. § 9–499.07(N)(3), took 20 percent of those 14 days, or 2.8 days, which it rounded up to 3 days, and thus ordered Defendant to serve 3 days in jail and 11 days on home detention, with the remaining 31 days suspended.

The State contends the "45 consecutive days in jail" under A.R.S. § 28–1382(D)(1) is "the initial term of incarceration in jail" under A.R.S. § 9–499.07(N)(3), thus the trial court should have taken 20 percent of those 45 days, or 9 days, and ordered Defendant to serve 9 days in jail and 5 days on home detention, with the remaining 31 days suspended. This Court agrees with the State.

The issue before this Court is a question of statutory construction, a legal issue this Court reviews de novo. *State v. Leonardo (Gannon)*, 226 Ariz. 593, 250 P.3d 1222, ¶ 5 (Ct. App. 2011). In interpreting a statute, this Court's goal is to determine the intent of the legislature, and the statute's language is the best indicator of that intent. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). Thus, if that language is unambiguous, this Court will apply the language as written, without resorting to other rules of statutory construction. *State v. Getz*, 189 Ariz. 561, 563, 944 P.2d 503, 505 (1997).

As noted above, the language of the applicable statute is as follows:

> 3. [I]f the prisoner is sentenced under § 28–1381, subsection K or 28–1382, subsection D or E, the prisoner first serves a minimum of 20 per cent of ***the initial term of incarceration in jail*** before being placed under home detention or continuous alcohol monitoring.

A.R.S. § 9–499.07(N)(3) (emphasis added). That section refers only to subsection (D) or (E), and does not refer to subsection (I). It thus appears the intent of the legislature is the sentence imposed under subsection (D)(1) is "the initial term of incarceration in jail." In this case, the sentence the trial court imposed under subsection (D) was a "45-day jail term." Because that was "the initial term of incarceration in jail" the trial court imposed, Defendant was not eligible for home detention until she had served 20 per cent of those 45 days, or 9 days in jail.

Further support for this is the language of subsection (I), which provides (for a 1382(A)(2) charge) the trial court may suspend "all but 14 days of the sentence." Thus, subsection (I) does not give a trial court the authority to impose a sentence, it only gives the trial court the authority to suspend a portion of the sentence already imposed. As a result, the "45 consecutive days in jail" imposed under subsection (D)(1) is "the initial term of incarceration in jail," with the trial court having the authority to suspend "all but 14 days of [that] sentence" under subsection (I).

In support of its position, the State cites *State v. Oppido*, 207 Ariz. 466, 88 P.3d 180 (Ct. App. 2004), which dealt with a prior version of these statutes. In that case, the court held as follows:

> . . . .
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> . . . .

A.R.S. § 9–499.07(N)(3) states that to be eligible for home detention a person must meet certain requirements. Those include first serving "a minimum of 15 consecutive days in jail before being placed under home detention" if the person "is sentenced under . . . § 28–1382, subsection D or F." Subsection (E) is not referenced in the home detention statute. The key question in this case then becomes whether appellant was sentenced under subsection (D) or solely under subsection (E) of the Extreme DUI statute, A.R.S. § 28–1382. As discussed below, under the plain language of the pertinent statutory provisions, appellant was sentenced under subsection (D), with a portion of that sentence available for suspension under subsection (E).

According to A.R.S. § 28–1382(D)(1), a person convicted of violating the section shall, among other things, "be sentenced to serve not less than 30 consecutive days in jail and is not eligible for probation or suspension of execution of sentence unless the entire sentence is served." Immediately following that, subsection (E) states that "[n]otwithstanding subsection D, paragraph 1 of this section, at the time of sentencing the judge may suspend all but 10 days of *the sentence* if the person completes a court ordered alcohol or other drug screening, education or treatment program." A.R.S. § 1282(E) (emphasis added).

In this case, appellant contends he was sentenced to 10 days' jail according to subsection (E) while the state contends he was sentenced to 30 days' jail under subsection (D) with 20 days of the sentence suspended under subsection (E). The state's interpretation is correct. "[T]he sentence" referred to in subsection (E) is the 30-day sentence required by subsection (D). A person cannot be sentenced to 10 days' jail under the statute; he may only be sentenced to 30 days' jail under subsection (D) and then have 20 days of that sentence suspended pursuant to subsection (E) if he completes a treatment program.

The remaining portion of subsection (E) makes this even more clear. It states that "[i]f the person fails to complete the court ordered alcohol or other drug screening, education or treatment program and has not been placed on probation, the court shall issue an order to show cause to the defendant why the remaining jail sentence should not be served." A.R.S. § 28–1382(E) (emphasis added). The sentence given is for 30 days, not for 10 days as appellant urges.

In sum, for a person sentenced pursuant to A.R.S. § 28–1382(D) the judge may suspend all but 10 days of that sentence pursuant to A.R.S. § 28–1382(E). However, any suspension of sentence made according to subsection (E) does not change the fact that the person was sentenced under subsection (D). Thus, a suspension of sentence under subsection (E) does not remove the person from the eligibility requirements of A.R.S. § 9–499.07(N)(3), which expressly pertain to subsection (D).

Because appellant was sentenced pursuant to A.R.S. § 28–1382(D), he was not eligible for home detention until he first served a minimum of 15 consecutive days in jail as provided in A.R.S. § 9–499.07(N)(3). The city court's sentence, allowing for home detention after 2 days' jail, was accordingly in error. The superior court was correct in so declaring.

Oppido at ¶¶ 5–10. Applying that reasoning to the present case, "A person cannot be sentenced to [14] days' jail under the statute; he may only be sentenced to [45] days' jail under subsection (D) and then have [20 percent] of that sentence suspended pursuant to subsection [(I)] if he [equips any motor vehicle the person operates with a certified ignition interlock device for a period of 12 months]." *Oppido* at ¶ 7. Based on *Oppido,* a trial court imposes sentence under A.R.S. § 28–1382(D)(1) and not under A.R.S. § 28–1382(I), thus "the initial term of incarceration in jail" is the sentence of "not less than 45 consecutive days in jail" under § 28–1382(D)(1).

Defendant contends *Oppido* is distinguishable because the current version of A.R.S. § 9–499.07(N)(3) used the wording "a minimum of 20 percent of the initial term of incarceration in jail before being placed in home detention," while the version considered in *Oppido* did not contain that language. Defendant is correct that the language is different, but the language at the time of *Oppido* was "a minimum of 15 consecutive days in jail before being placed in home detention." Although the legislature did make a change in the language, this Court does not view that change as definite enough to show some legislative intent that "the initial term of incarceration in jail" is what is left after the suspension of a portion of the sentence, as opposed to the sentence initially imposed. What is consistent is what is ***not*** included in A.R.S. § 9–499.07(N)(3). At the time of *Oppido,* that statute did ***not*** refer to A.R.S. § 28–1382(E), which was the provision that allowed for the suspension of a portion of the sentence, and it presently does ***not*** refer to A.R.S. § 28–1382(I), which is the provision that now allows for the suspension of a portion of the sentence. Thus, to the extent the reasoning in *Oppido* is based on a lack of a reference in A.R.S. § 9–499.07(N)(3) to the provision allowing for the suspension of a portion of the sentence, that reasoning continues to apply.

Moreover, it is this Court's view that, in order to adopt Defendant's reasoning, the statute would have to be written as follows:

> 3. [I]f the prisoner is sentenced under § 28–1381, subsection K or 28–1382, subsection D or E, the prisoner first serves a minimum of 20 per cent of the initial term of incarceration in jail before being placed under home detention or continuous alcohol monitoring. [If the trial court, under § 28–1381, subsection L, or 28–1382, subsection I, suspends a portion of the sentence imposed, the prisoner first serves a minimum of 20 per cent of the portion of the sentence not suspended (rounded up to a full day) before being placed under home detention or continuous alcohol monitoring.]

A.R.S. § 9–499.07(N)(3) (language in brackets added). If the legislature had written the statute using that wording, it would have clearly expressed a legislative intent. However, defining crimes and fixing punishments are functions of the legislature, thus courts may not add language to crimes or punishments as defined by statute. *See State v. Miranda,* 200 Ariz. 67, 22 P.3d 506, ¶ 5 (2001). If the above version actually reflects the intent of the legislature, the legislature must be the one to adopt such additional language.

Defendant notes that certain cities, such as Scottsdale, do not have their own jails and thus must house their DUI inmates in the Maricopa County Jail and pay to the County the cost of housing those inmates. Defendant contends her interpretation of the statute reflects the intent of the legislature to lessen the financial burden on the cities by requiring fewer days in jail. For six reasons, this Court does not agree with Defendant's contentions.

First, this Court does not believe that is the intent of the legislature. For the New Criminal code, the legislature has stated its intent:

> **Purposes.** It is declared that the public policy of this state and the general purposes of the provisions of this title are:
>
> 1. To proscribe conduct that unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;
>
> 2. To give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction;
>
> 3. To define the act or omission and the accompanying mental state which constitute each offense and limit the condemnation of conduct as criminal when it does not fall within the purposes set forth;
>
> 4. To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties for each;
>
> 5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized;
>
> 6. To impose just and deserved punishment on those whose conduct threatens the public peace; and
>
> 7. To promote truth and accountability in sentencing.

A.R.S. § 13–101. Because that statute states "the general purposes of the provisions of this title," it refers to Title 13 and not Title 28, but there is nothing to indicate the legislature's purpose for Title 28 was any different than for Title 13.

Second, there is nothing in Title 28 that states the general purposes of the sentencing provisions include the lessening of the financial burden on the cities by requiring fewer days in jail. If that was truly the intent of the legislature, it should have stated it explicitly somewhere.

Third, if it was the intent of the legislature to lessen the financial burden on the cities by requiring fewer days in jail, it could have accomplished that purpose by directly specifying fewer days in jail, such as requiring a person who is convicted of a violation of A.R.S. § 28–1382(A)(2) shall be sentenced to serve not less than 3 consecutive days in jail. This would have accomplished directly what Defendant contends the legislature intended to accomplish indirectly.

Fourth, the statutes require a person sentenced to serve a term in jail to pay for the costs of incarceration. Thus, the financial burden falls of the person sentenced to jail and not on the city. And Defendant has presented nothing to show that the purpose of the legislature was to lessen the financial burden on the person sentence to jail by requiring fewer days in jail.

Fifth, although it may have been the intent of certain members of the legislature to lessen the financial burden on the cities by requiring fewer days in jail, there is no showing that was the intent of each and every member of the legislature who voted in favor of that statute. It sometimes happens that members of the legislature vote in favor of a certain bill or amendment and do not realize what the actual effect that bill or amendment may be, and thus do not intend for the bill or amendment to have that effect.

And sixth, even if the intent of the legislature actually was to lessen the financial burden on the cities by requiring fewer days in jail, if the language of the statute as written will not allow for that result, the courts must follow the language of the statute as written, and may not alter the language of the statute to achieve some other result. As discussed above, this Court has concluded the language of the statute as written does not allow for the fewer days in jail, as advocated by Defendant.

Finally, Defendant notes that, under this Court's interpretation of the above statutes, if the trial court imposed a sentence of 180 days and then suspended 150 of those days so that the defendant would have to serve 30 days in jail, the defendant would never be able to participate in home detention because "the initial term of incarceration in jail" would be 180 days and the "minimum of 20 per cent" of that would be 36 days. Defendant thus contends this Court's interpretation of the statutes gives the trial court less discretion. The State argues in its response that the trial court still has a certain amount of discretion. This Court is of the opinion that the discussion above is what the language of the various statutes requires, and if the Arizona Legislature wishes to give the trial courts more discretion, it will have to amend the statute, as discussed above.

III. CONCLUSION.

Based on the foregoing, this Court concludes "the initial term of incarceration in jail" under A.R.S. § 9–499.07(N)(3) is the "not less than 30 consecutive days in jail" for an (A)(1) charge and the "not less than 45 consecutive days in jail" for an (A)(2) charge under A.R.S. § 28–1382(D)(1), thus Defendant must serve either not less than 6 days in jail for an (A)(1) charge or 9 days in jail for an (A)(2) charge before being eligible for home detention.

IT IS THEREFORE ORDERED vacating the sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings consistent with this minute entry.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT 110420131620•

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